

June 24, 2019

VIA ECF

Honorable Lorna G. Schofield
United States District Judge
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, New York 10007

RE: Contant, et al. v. Bank of America Corporation, et al., 17-cv-3139

Dear Judge Schofield:

The undersigned non-settling defendants in the above-captioned action write in anticipation of the hearing on plaintiffs' Motion for Preliminary Approval of Settlement with Citigroup Inc., Citibank, N.A., Citicorp, and Citigroup Global Markets Inc. (collectively, "Citigroup") and MUFG Bank, Ltd. (formerly known as The Bank of Tokyo-Mitsubishi UFJ, Ltd) ("MUFG"). (ECF No. 272.) In that motion, plaintiffs request that the Court enter an order preliminarily approving the settlements, preliminarily and conditionally certifying the settlement classes, and appointing class counsel and representatives for the settlement classes. Non-settling defendants expect to vigorously challenge certification of a litigation class in this litigation. Accordingly, non-settling defendants respectfully request that two clarifying additions be made to the proposed preliminary approval order, both of which had been included in this Court's order preliminarily approving settlement agreements in a related action, *In re Foreign Exchange Benchmark Rates Antitrust Litig.*, No. 13-cv-7789 (S.D.N.Y.) ("*FOREX*"), ECF No. 536, Preliminary Approval Order, ¶¶ 22, 25.

Plaintiffs, Citigroup, and MUFG do not object to either of these proposed amendments.

1. We respectfully request that the Court add the following provision, making clear that the approval of a settlement class is without prejudice to non-settling defendants' ability to challenge certification of a litigation class:

The Court's preliminary certification of the Settlement Classes as provided herein is without prejudice to or waiver of the rights of any defendant other than Citigroup and MUFG to contest certification of any other class proposed in this Action. Except in the context of a proposed settlement pursuant to the Federal Rule of Civil Procedure 23(e), the Court's findings in this Order shall have no effect on the Court's ruling on any motion to certify any class in the Action, and no party may cite or refer to the Court's preliminary approval of the Settlement Classes as persuasive or binding authority with respect to any motion to certify any such class.

2. We respectfully request that the Court add the following language to the order, making clear that any stay of proceedings as to Citigroup and MUFG does not stay discovery of those parties by non-settling defendants:

The stay of proceedings in this Action with respect to Citigroup and MUFG entered by this Order shall not in any way stay matters related to discovery of Citigroup and MUFG in this action by the Non-Settling Defendants. The parties' rights with respect to such discovery are otherwise reserved and shall remain subject to the Court's orders on discovery.

It would be highly prejudicial to non-settling defendants to be denied the opportunity to seek discovery from Citigroup and MUFG, to the extent permitted by the Federal Rules of Civil Procedure, in a case that alleges a conspiracy among all defendants.

These two provisions were proposed by the *FOREX* non-settling defendants¹ as amendments to be included in the order preliminarily approving the *FOREX* plaintiffs' settlement agreements with Bank of America, Barclays, BNP Paribas, Citigroup, Goldman Sachs, HSBC, JPMorgan, RBS and UBS. See *FOREX*, ECF No. 485, Letter from the Non-Settling Defendants to the Court; *FOREX*, ECF No. 495, Preliminary Objections and Comments of the Non-Settling Defendants (further elaborating on the same). All parties in the *FOREX* action, including Citigroup and MUFG, agreed to include this language in the preliminary approval order. *FOREX*, ECF No. 532, Transcript of Dec. 11, 2015 Preliminary Approval Hearing, at 6:17-7:12. On November 2, 2018, non-settling defendants in this action, which at the time included MUFG, made a similar request to this Court. (ECF No. 169.) On November 15, 2018, the Court held a hearing to address plaintiffs' Motion for Preliminary Approval of Settlement with Citigroup (ECF No. 154), at which the Court denied plaintiffs' motion, rendering the non-settling defendants' request to include these two provisions to an order approving the settlement moot.

As noted, the parties to the Citigroup and MUFG settlements do not object to these proposed amendments. Non-settling defendants can prepare a mark-up of the proposed preliminary approval order, if doing so would assist the Court. Non-settling defendants also reserve all rights to object to final approval of the settlement or seek other appropriate relief.

Respectfully submitted,

¹ At that time, the *FOREX* Non-Settling Defendants included Credit Suisse, Deutsche Bank, Morgan Stanley, The Bank of Tokyo-Mitsubishi UFJ, Ltd., Royal Bank of Canada, Société Générale and Standard Chartered PLC. *Id.*

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